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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 590

CONSOLIDATED ELECTRIC LAMP COMPANY, et al.,
Petitioners

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners,[1] pray that a writ of certiorari be issued out of and under the seal of this Court to review a judgment of the United States Court of Appeals for the District of Columbia Circuit, dated September 18, 1958.

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[1] Consolidated Electric Lamp Company, General Electric Company, Sylvania Electric Products, Inc., Tung-Sol Electric, Inc., and Westinghouse Electric Corporation.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 259 F. 2d 189 (1958). Pursuant to Rule 23, it is included herein as Appendix A, and the opinion in *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 97 App. D.C. 165, which that court deemed controlling, is included as Appendix B. The opinion and order of the District Court, affirmed by the Court of Appeals, appear at pp. 51 and 52 of the Joint Appendix.[2] The administrative determinations of respondent Mitchell, challenged in this action, are printed at pp. 8-24, and pp. 25-31 of the same document.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254. The judgment of the Court of Appeals sought to be reviewed was entered on September 18, 1958.[3]

This case came before that Court on appeal from a final judgment of the United States District Court for the District of Columbia entered on June 27, 1957, granting respondent's motion for summary judgment and holding valid a determination by respondent, the Secretary of Labor, of prevailing minimum wages in the electric lamp industry (52).

The determination, challenged in this action, was made under Section 1(b) of the Walsh-Healey Public Contracts Act (referred to herein as "the Act"), 49 Stat. 2036 (1936), 41 U.S.C. 35 *et seq.*, as amended 66 Stat. 308 (1952). The action was brought by peti-

[2] Unless otherwise indicated, all page references in this petition are to the pages in the Joint Appendix, which the parties prepared for the consideration of the Court of Appeals.

[3] This judgment appears herein as Appendix C.

tioners to declare such determination unlawful and void and to enjoin respondent from enforcing or otherwise giving it effect (1-7).

In this determination, effective August 20, 1956, 21 F.R. 544 (25-31), the Secretary of Labor found the prevailing minimum wage for persons employed in the electric lamp industry to be $1.26 an hour for experienced workers (i.e., persons employed for not less than three months), and $1.20 for beginners. Petitioners, all of whom are listed in the Federal Supply Schedule for electric lamps (235-8), manufacture products including lamps and lamp parts within the scope of the Secretary's definition of the industry, and as persons "adversely affected or aggrieved" within the meaning of Section 10 of the Act, sought judicial review of the determination in the District Court.

In the District Court, respondent, the Secretary of Labor, moved to dismiss and in the alternative, for summary judgment (34-5). Petitioners filed a cross motion for summary judgment (41). The court did not refer either in its opinion (51) or order (52) to the motion to dismiss, and disposed of the case by denying petitioners' motion and granting respondent's motion for summary judgment.

On appeal, the court below in a short per curiam opinion by Judges Washington, Danaher, and Bastian, affirmed the judgment on the ground that the principal issue was foreclosed by its prior decision in *Mitchell v. Covington Mills*, 229 F. 2d 906.

QUESTIONS PRESENTED

1. Where prevailing minimum wages (including the minimum wages in collective bargaining agreements) for persons employed in a manufacturing industry

like the electric lamp industry, differ substantially from one locality to another, does Section 1(b) of the Walsh-Healey Act authorize a determination by the Secretary of Labor of a uniform, nation-wide minimum wage rate for this particular industry, irrespective of the locality where the lamps are manufactured or furnished?

2. Where the Secretary of Labor purports to base his wage determination solely upon the prevailing minimum wages for a "particular" industry in contradistinction to another statutory standard, "prevailing minimum wages for persons employed *in similar work*", may he disregard the limiting phrase "currently operating in the locality" which follows immediately after the words "particular or similar industries or groups of industries", on the asserted ground that "an industry wide determination is permissible where the marketing and competitive factors warrant it"?

3. If the preceding question is answered in the affirmative, does not the finding of nationwide competition among the lamp manufacturing companies as the justification for disregard of local wage differentials, preclude the Secretary of Labor from determining as the "*prevailing* minimum" for the industry, a wage rate higher than the minimum wage rate of any of the competing companies—a rate compelling every manufacturer to increase wages in order to supply lamps to the Federal Government?

APPLICABLE STATUTORY PROVISIONS

The Walsh-Healey Public Contracts Act, Act of June 30, 1936, 49 Stat. 2036, 41 U.S.C. 35.

Sec. 1. . . .

"In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

* * * * * * * * *

"(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; * * *

The Fulbright Amendment to the Walsh-Healey Public Contracts Act, 66 Stat. 308, 41 U.S.C. 43a:

* * * * * * * * *

"Sec. 10 (a) Notwithstanding any provision of section 4 of the Administrative Procedure Act,

such Act shall be applicable in the administration of sections 1-5 and 7-9 of this Act.

"(b) All wage determinations under section 1(b) of this Act shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in section 10 of the Administrative Procedure Act by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacture of or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

"(c) Notwithstanding the inclusion of any stipulations required by any provision of this Act in any contract subject to this Act, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms 'locality,' 'regular dealer', 'manufacturer', and 'open market'."

STATEMENT OF THE CASE

1. *The Hearing:*— Prior to the issuance of the wage determination challenged in this case, an administrative hearing was held in the Department of Labor. A Bureau of Labor Statistics wage survey of the electric lamp industry was introduced. Evidence was also received from union and industry representatives with respect to the wage rates established by collective agreement and the wage structures of various individual companies and plants.

The industry panel (petitioners here) also presented a survey made by a private statistical agency showing in the localities (i.e., metropolitan or labor market areas) where lamp plants were situated, the lowest established wages of all manufacturing establishments, and also the corresponding rates paid in the manufacturing establishments in those localities where the processing of materials, as in the lamp establishments, consisted primarily of light repetitive operations. The record shows:

The electric lamp industry consists of 27 manufacturing companies, employing about 24,000 workers (57, Govt. Ex. 4, Table 1). The total production of lamps in this country, according to census figures, amounts to $300 million of which the Government purchases about $10 million—approximately 3% of the national aggregate (84). Three of the petitioners, General Electric Company, Westinghouse Electric Corporation, and Sylvania Electric Products, Inc., produce the great bulk of the lamps made in the United States.

There are 21 plants in the lamp division of General Electric making products within the scope of the industry definition; nine in the corresponding division of the Westinghouse; and eight in Sylvania. Of the remaining 24 companies in the industry, all but the fourth petitioner, Tung-Sol Electric, Inc. (which has two plants) have more than one lamp manufacturing establishment. The fifth petitioner here is Consolidated Electric Lamp Company which operates one plant, the Champion Lamp Works at Lynn, Mass.

2. *Geographic differences in union rates*:— Although the lamp industry is heavily unionized, the collective bargaining agreements of the companies with the

three principal unions in the industry; the IUE-CIO, the UE, and the IBEW-AFL, show the absence of national or regional wage standards in the bargaining pattern. Union contracts exist at all nine of the Westinghouse plants (138, 142), at 16 of the 21 General Electric plants (249, 168, 159), three of the eight Sylvania plants (249), and the single Consolidated plant (220).

The IUE-CIO, which represents eight General Electric plants, has a multi-plant agreement with the Company. This contract, however, contains clauses leaving the negotiation of hourly rates to local unions and local plant management (269-270). Starting rates at unionized General Electric locations run from 1.20½ at Lexington, Ky. (159) to 1.425 in Warren, Ohio, and Youngstown, Ohio (249, 167, 168).

Westinghouse has a single master contract with the IUE but this agreement also calls for local negotiation of wage schedules (266). The minima in the four lamp locations covered by the contract range from 1.33 in Fairmont, West Virginia, to 1.43 in Bloomfield, New Jersey and Belleville, New Jersey (249). Four Westinghouse plants in the South, all negotiated for on a single plant basis (89, 90, 138), are covered by agreements with the IBEW-AFL, with a lowest minimum rate of .92 in Little Rock, Arkansas. Thus the union rates in Westinghouse reflect a spread of 49 cents, running from .92 to 1.43, depending on the location of the plant.

The evidence further reveals the only sign of uniformity among union minima tends to be when plants are in the same metropolitan area. Thus, IUE has a contract with Consolidated at Lynn, Mass., establish-

ing a minimum of 1.18 (220) and in the adjacent city of Salem, has a contract with Sylvania establishing a minimum starting rate of 1.20. The starting rate under the UE contract with another Salem plant of Sylvania is the same. This is also the Sylvania minimum rate in nearby Danvers and Ipswich.

The variance in wages between the different lamp production areas is due to the impact of local wage levels. A Sylvania executive testified (121, 123, 124) that whenever a new plant is established the company ascertains from the employment office in the local market area and by visits with other manufacturers in that vicinity, the current wages being paid on various types of jobs. Sylvania then establishes its own wage structure in accordance with the prevailing rates in the area (124). He also stated that even where there are multi-plant union agreements, wages are still fixed on a community basis (125). Similar testimony was received from officials of Westinghouse (137, 138) and General Electric (161-163).

Evidence produced with respect to union rates in the single plant companies was meagre, but did disclose that even though the majority of these companies are in such metropolitan areas as greater New York and Chicago (240), the minimum rates were lower than those found in most of petitioners' plants located in the Northeast and Middle West. A table presented by a trade association representing 16 of these small companies showed minimum rates running from 75 to 95 cents (247-8).

3. *Position of Petitioners*:— The industry panel contended that because there was no uniformity of wages in plants of the same company, even under col-

lective agreements, the Secretary should follow the precedents set in the Bituminous Coal and Steel determinations, i.e., establishing separate minima for areas coextensive with the geographic differentials recognized by collective bargaining agreements. In the Steel case, there had been three such areas, in Bituminous, 25. They urged that in the lamp industry, the data showed the appropriate area was the metropolitan district or local labor market area (12).

Mindful of the observation of the Secretary in the Textile determination—and aware that in some such areas there was only one lamp plant,[4] petitioners urged the Secretary to consider other statutory standards than wages in the particular industry and to base his determination on wages paid for "similar" or "groups of industries" in such localities. In this connection, expert testimony was offered analyzing the tables prepared by the private survey agency of prevailing minimum wages in 37 different localities (Ind. Ex. 25, 26, and 28), from which another table was developed showing the indicated determinations for those areas (274). Thus the Secretary had before him concrete suggestions for the prevailing wage levels and boundaries of some 37 different industrial areas (274).

4. *Effect of Wages on Government Contracts*:—Petitioners also attempted to eliminate another con-

[4] In setting a national wage in that case, the Secretary rejected the locality argument on the ground, *inter alia*, that

> "... no attempt was made to list or otherwise define the factors or circumstances which should be taken into account in determining the limits of such localities and, in fact, it was conceded by counsel that neither they nor the firms they were representing were prepared to offer any concrete criteria which might be applied in delineating such localities." (Textile Determination, p. 6; 17 F.R. 1197, 9).

sideration advanced by the Secretary in the Textile case for refusing to make "locality" determinations. According to the Secretary, the purpose of the Act was

> ". . . to bring about a situation where employers paying fair and reasonable wages would not lose out on Government business to low-paying firms. Under the system of competitive bidding adhered to by the Government, the various contracting agencies must accept the lowest responsible bid . . . . Any construction of the locality language which would result in freezing the lows and the highs in wages would certainly not carry out the purpose of the Act. In other words, if the dominant plant or plants in community A were paying substantially lower wages than plants in community B, the recognition of community A and community B as separate localities would mean that plants in A could continue to underbid plants in B and the situation would be frozen at that level." (Notice of Proposed Amendment . . . Textile Industry, 17 F.R. 1197, 8.

It should be noted that one of the major assumptions in the foregoing is that Government agencies must accept the "lowest responsible bid" to the exclusion of all others. Conceivably this may be true of the Government's methods of procuring textiles. The panel, however, submitted evidence that the Government's plan for obtaining lamps, not being based on such procedure, places no premium on price or wage cutting.

Under the multiple award system developed by the General Services Administration, virtually all electric lamps are purchased by Federal agencies under a single Federal Supply Schedule based on negotiations each year with nine or ten companies (93, 250-265).

The lamps listed on the Schedule are standard types also available to industrial and domestic customers (105, 111). It is not the practice to give any company an exclusive contract on particular items. When a company receives an award, it then circulates to 5200 Government installations its authorized price list on the items for which it is an authorized contractor (94). Each installation has its choice of the company from which it orders provided that manufacturer has received an award.

It is not necessary to be the lowest bidder to obtain an award (250). All that the Government requires is that the quoted prices be "reasonable" (250). Consequently, under the multiple award system, there is considerable variety in the prices charged the Government by the different manufacturers (236-8). The result is that the Federal Supply Schedule includes companies like petitioners, some of whose plants pay the very highest wages in the industry, as well as small companies where wages are substantially lower.

5. *The Determination*:— In rejecting petitioners' case for separate determinations in the different producing areas, the Secretary emphasized that particular plants in the multi-plant companies were parts of an integrated system in which nationwide distribution of the company's products was based upon the flow of lead wires, coils, and bases from various parts plants into assembly plants, some of which specialized in a particular type of lamp, and thence to warehouses where all types of lamps were stocked. From this and from an offer of industry counsel to stipulate that "the marketing area for which the various *lamp companies* compete is nationwide", (15) he concluded that "geographic differentials cannot be adopted for this

industry without defeating the purposes of the Public Contracts Act" (16).

In excepting to this proposed determination petitions pointed out that if a nationwide minimum was required because each of the 27 companies competed for a nationwide market, then the logic of this premise made it incumbent upon the Secretary to take into account only the respective minimum wage in effect in the lowest paid plant of each competing company, rather than using a formula which treated the industry as an aggregate of plants instead of an aggregate of companies.

In his final determination (25-31), the Secretary reaffirmed the proposed minimum of $1.26; even though the evidence showed that this asserted prevailing rate was higher than the minimum of any of the 27 companies covered by the survey on which he relied. Only 25 of the 63 plants studied were shown to have an established minimum rate for workers which was as high as $1.26. Of these 25 plants, 20 were in the General Electric division, four in Westinghouse, and one in Tung-Sol. One General Electric location (Goldsboro, N. C.) was substantially below this level. This was also true of five of the nine Westinghouse plants, the second Tung-Sol plant, all eight Sylvania plants, as well as each of the 23 establishments operated by the 23 other companies.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE ASSERTED AUTHORITY OF THE SECRETARY OF LABOR TO MAKE INDUSTRYWIDE MINIMUM WAGE DETERMINATIONS WITHOUT REGARD TO PREVAILING MINIMUM WAGES IN THE LOCALITY PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

(a) Nearly Every Manufacturing Industry is Affected

The first issue of statutory construction which this case presents has such a direct bearing upon the wages practices of nearly every manufacturing industry that it may truly be described as "an important question of Federal law, which has not been, but should be settled by this court". This is the question of the authority of the Secretary of Labor under the Walsh-Healey Act to make national minimum wage determinations for particular industries without regard to well established sectional or area differentials. If the decision of the District of Columbia Court of Appeals upholding such a determination in this case at wage levels substantially above the minimum rate of one dollar an hour provided by Congress in the amendments to the Fair Labor Standards Act in 1955 is permitted to stand, the wage provisions of the Walsh-Healey Act, originally regarded as extremely limited in scope, will have a much greater impact upon the wage structures of industry generally than the later and more comprehensive enactment.

In theory, the actual effect of wage determinations under the Walsh-Healey Act may not seem too great because the rates are binding only upon such companies in the industry covered thereby as may wish to bid on Government contracts. But "what the Court is interested in is the actual practical effect of the disputed decision . . . its consequences for other litigants and in other situations". (Address by former Chief

Justice Vinson to the American Bar Association, Sept. 8, 1949, 69 S. Ct. v, vi).

The fact is that Government purchases today are so tremendous and cover such a wide cross section of industry that very few manufacturers can maintain their competitive position without some Government orders. This means that in practice the large companies are compelled to conform to these wage determinations in order to retain their Government business and small companies will often comply because Government purchases enable them to survive.[5]

Moreover, a determination by the Secretary of Labor has ramifications far beyond the work a particular company performs on Federal contracts. A great majority of manufacturing establishments are integrated in their Government and non-Government production so that even though Government business is only a small proportion of a plant's total volume, the work on the contract is done by the same employees engaged in the production of goods for private consumers.

The electric lamp industry illustrates such an integration. It is a practical impossibility to segregate the employees who manufacture lamps supplied to the Government from the rest of the working force, as Federal agencies purchase nearly every type of lamp listed in the catalogues of the respective manufacturers. Thus, the challenged determination of the Secretary has been felt throughout the entire wage

[5] Under the present Federal budget, the annual volume of Government contracts is estimated to exceed $30 billion—a greater amount than the $20.5 billion in total retail sales predicted by economists for the month of December, 1958 (Washington Rept., Vol. 2, No. 9, p. 3, U.S. Chamber of Commerce).

structure of every lamp manufacturing company on the Federal Supply Schedule.

Until very recent years the far reaching effect of Walsh-Healey Act wage determinations under such an administrative construction of the statute as the Court of Appeals for the District of Columbia has approved, was not fully understood either by Congress or the business community. That is because in the pre-war period of the Walsh-Healey Act most of the wage determinations were made in such small subdivisions of the apparel industry as "mens' work clothing"; "mens' underwear", "mens' neck wear", "mens' hats and caps", or in such minor industries as "tags", "vitreous china" and "evaporated milk". Even in many of those cases, geographic wage differentials were given effect.[6]

In the Department of Labor's first venture into heavy industry—a minimum wage for basic steel—the determination recognized wage differentials in five different steel producing "localities" or regions. Even this decision was challenged in the courts on the ground that the areas were broader than Congress intended.[7] This Court, however, declined to pass on the merits of the determination, holding that the plaintiffs had no standing to sue. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

Shortly after this decision was handed down, however, the 40-cent floor in the Fair Labor Standards Act became generally effective, thus superseding many of the earlier determinations. With wages sky-rocket-

[6] "The Prevailing Minimum Standard of the Public Contracts Act", Thomas Holland, 1939 (Department of Labor), pp. 265-6.

[7] This contention was upheld in the District of Columbia Circuit. *Lukens Steel Co.* v. *Perkins*, 107 F. 2d 627.

ing in the war and post-war periods, the various Secretaries of Labor had little occasion to make any new industry determinations. In 1950, when a new Secretary of Labor announced an ambitious program for a series of wage determinations that would apply to all industries receiving substantial amounts of Government orders, considerable concern was expressed in Congress at indications that many of the proposed determinations contemplated national rather than local wage minima.

A hearing inquiring into this matter was held by a subcommittee of the Senate.[8] Apparently disturbed by the Secretary's proposed administrative actions, Congress enacted in 1952 the Fulbright amendment intended to override the *Lukens* case by providing for judicial review of wage determinations. The present Secretary of Labor has conceded that Congress has "not" seen fit to affirm the "past practices" of Secretaries of Labor under the Walsh-Healey Act but has "left the matter to resolution of the courts".[9] Obviously this concession is scarcely consistent with the argument, later advanced in his behalf to the Court of Appeals in the *Covington* case, that long legislative inaction was tantamount to Congressional approval or ratification of the Secretary's administrative interpretation of Section 1(b) of the Act.

Notwithstanding the criticisms which had preceded passage of the Fulbright Amendment, Secretary of Labor Tobin in the first determination after its terms had become effective, promulgated a national mini-

[8] Hearings on S. 2594, 82d Cong., pp. 2475 ff.

[9] Decision by James P. Mitchell, Secretary of Labor . . . "In the Matter of Determination of Prevailing Wages for the Woolen and Worsted Industry", January 27, 1954, 19 F.R. 535.

mum wage of one dollar for the textile industry.[10] In an action for judicial review, this administrative decision was pronounced invalid by the District Court.[11] This judgment was reversed on appeal by a divided court consisting of Judges Edgerton, Danaher and Washington, the latter dissenting on the ground that the majority opinion disregarded not only the language but the legislative history of the statute, and that the problem of runaway industry, with which the Department seemed to be concerned, was not intended to be dealt with by the Walsh-Healey Act but by such explicit legislation as the Fair Labor Standards Act.

By the time a petition for certiorari reached the Supreme Court, Congress had made effective an amendment to the Fair Labor Standards Act, establishing the same minimum wage rate set for the textile industry, viz., one dollar for all employees manufacturing goods for interstate commerce. In declining to review the case,[12] this Court accordingly may have been influenced by some feeling that the wage problems created for the textile industry by the Secretary's proposal were academic. It is also possible that the Court may have thought that the time was not

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[10] Determination in Cotton Textile Industry, Jan. 15, 1953; 18 F.R. 472.

[11] *Covington* v. *Mitchell*, 129 F. Supp. 740.

[12] *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 97 App. D.C. 165, *cert. denied*, 350 U.S. 1002 (1956). During the same term the Court also denied an application for certiorari challenging a similar determination for the woolen industry, but in that case the judicial decision sustaining the action of the Secretary of Labor was made in the District Court and the Solicitor General's opposition to the granting of the writ was directed largely at petitioners' failure to perfect their appeal from this judgment to the Court of Appeals. See memorandum in opposition, *Allendale Co.* v. *Mitchell*, *cert. denied*, 351 U.S. 909.

ripe for conclusive adjudication of the issue on the theory that it might be desirable to have different aspects of the issue clarified by the lower courts.[13]

If either of these considerations affected the Court in denying certiorari in *Covington*, neither is applicable here. The construction of Section 1(b) of the Act adopted in the textile wage determination, far from being an isolated instance of administrative caprice (soon cured by the revised Fair Labor Standards Act), has been followed in the past four years by 13 determinations, all, with the exception of one, fixing a nationwide rate. Many of them dealt with industries not subject to wage determinations during the first 20 years of the Walsh-Healey Act.[14]

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[13] In *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 918, Mr. Justice Frankfurter said: "Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue illumined by the lower courts. Wise adjudication has its own time for ripening."

[14] The following wage determinations have been made by Secretary Mitchell under the Walsh-Healey Act since he took office in October, 1953.

Industry	Date	Area	Rate
Battery	5/27/57	Industrywide	$1.35 (in major branches)
Bituminous Coal (2) (revised)	11/25/55 10/20/58	23 Districts	several
Drugs & Medicine	9/ 1/58	Industrywide	1.20
Electric Lamp	8/10/56	Industrywide	1.26
Envelopes	12/ 5/55	Industrywide	1.08
Metal Business Furniture	12/ 6/54	Industrywide	1.10
Office Machines	6/18/56	Industrywide	1.10
Paint & Varnish	7/24/58	Industrywide	1.50
Paper & Pulp	12/15/55	Industrywide	1.115
Photographic Equipment	5/ 8/56	Industrywide	1.18
Scientific Instruments	4/25/58	Industrywide	1.20
Surgical Instruments	9/ 1/58	Industrywide	1.25
Woolen & Worsted	5/ 7/54	Industrywide	1.20

Source: Wage and Hour Manual, 90.3-90.9; Bureau of National Affairs.

The list of pending determinations now includes such industries as Tires, Missiles and Aircraft, Electron Tubes and Chemicals. Thus, the final outcome of this case will have repercussions on nearly every major industry.

Moreover, any likelihood that further litigation will produce lower court decisions illuminating other aspects of the issue has been shattered by the summary manner in which the courts of the District of Columbia—the only jurisdiction in which these determinations may be reviewed—have disposed of this case, despite the numerous features of the administrative record distinguishing it from *Covington*.

The brevity of the opinions in the District and Circuit Courts in the instant case indicate that because of the denial of certiorari in *Covington*, the judges regard themselves as bound by the doctrine of *stare decisis* and can no longer give independent consideration to the propriety of nationwide industry determinations under any circumstances. The apparent unanimity displayed in the opinions in the instant case does not reflect the original independent views of the judges of the District of Columbia. District Judges Schweinhaut and Holtzoff in *Covington*[15] and District Judge Tamm in *Allendale*[16] have all held that the word "locality" cannot include the entire United States. Circuit Judge Washington advanced the same view in his dissent in *Covington* and Circuit Judges Bastian and Miller recorded their votes in favor of rehearing *en banc* after the court reached that decision. The concurrence of Judges Washington and Bastian in the

[15] 129 F. Supp. 740-43.

[16] 12 WH Cases 450 (1955).

per curiam opinion in the instant case shows what broad meaning the court is now according to the majority opinion in *Covington*.

Dissatisfied with the scope of the Fulbright Amendment in the District of Columbia jurisdiction, the House of Delegates of the American Bar Association, meeting in Los Angeles this year adopted the following resolution providing for more direct and more extensive judicial review:

> "Resolved, That the Walsh-Healey Act be amended to provide for initiation of judicial review of minimum wage determinations by the Secretary of Labor in the United States Courts of Appeals, instead of the United States District Courts."[17]

Thus, both Congress and the bar are seeking authoritative and conclusive judicial determination of the questions presented here.

(b) The Decision of the Court Below Was Clearly Erroneous

It was an error of statutory construction for the Secretary to hold as he did in this determination that ". . . there is authoritative and compelling support for the conclusion that an industrywide determination is permissible where the marketing and competitive factors warrant it." Whether or not the word "locality" means region or some smaller geographic area, it is clear that Congress intended the phrase "currently operating in the locality" to modify all four of the standards for ascertaining prevailing minimum wages in Section 1(b) of the Act. Consequently, in this case, where the record showed substantial wage

[17] American Bar Association Journal, November 1958, pp. 11-12.

variations in the areas where lamps are produced, the reviewing court erred in not holding an industrywide determination beyond the powers conferred upon the Secretary of Labor by the Act.

The majority opinion in the *Covington* case upon which the court below relied, held that in some industries, only an industrywide minimum would serve the purpose of the Act "because the competition is industrywide". Chief Judge Edgerton, the author of the opinion, went on to say:

> ". . . The District Court's construction of the act would make it necessary for the Secretary to fix separate minima according to the wages that prevail in each separate textile community. This would freeze the competitive advantage of concerns that operate in low-wage communities and would in effect offer a reward for moving into such communities. Obviously this would defeat the purpose of the Act. It would also make the Act nearly meaningless as applied to a large part of the textile industry, since there is frequently only one textile concern in one neighborhood and it necessarily pays the wages that prevail in its plant".[18]

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[18] In this case, had the Secretary given consideration to the independent survey offered in evidence by petitioners which showed prevailing minimum wages for all manufacturing industries as well as for all industries with light repetitive work operations in the various localities where lamp plants were situated (274), he could have avoided any determination which would have made the Act "nearly meaningless". Using this table based on the data relevant to the fourth and third alternative standards in Section 1(b) of the Act, his decision then would have compelled any lamp manufacturing establishment not conforming to prevailing area wages to have come up to the standard in order to be eligible for Government contracts. Thus the possibility envisaged by Judge Edgerton of a single plant, if it happened to be the only one in the particular industry in a given community, writing its own wage ticket, could

We submit that the premise that the Act was intended to deflect Government business from manufacturers whose wage standards conformed only to the prevailing wage pattern of "low wage communities" flies in the face of clear and unequivocal evidence of Congressional purpose. It is true that the Walsh-Healey bill as first introduced was concerned with the possibility of manufacturers in "low wage areas" getting a disproportionate share of Government contracts. As originally written the language requiring the Secretary of Labor to determine minimum wages on the basis of "fair and reasonable value of the services" would seem to have authorized industrywide determinations. The Judiciary Committee of the House, however, struck this language and substituted for it subsection 1(b) which makes the minimum wage standard depend upon prevailing wages in the locality.

On the floor the managers of the bill explained that this amendment removed earlier objections to the proposed legislation by limiting the discretion of the Secretary of Labor so that his only function was to find the prevailing minimum wage in the community,[19] or, as Representative Healey, the sponsor of the bill and chairman of the sub-committee reporting it to the floor, expressed it, "the general locality".[20] Other proponents of the bill made similar explanations. It is unnecessary to describe this legislative history in detail. Relevant portions appear in the appendix

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have been prevented under a determination requiring the payment of rates based upon "prevailing minimum wages . . . for . . . similar industries or groups of industries currently operating in the locality".

[19] 80 Cong. Rec. 10004, 8.

[20] 80 Cong. Rec. 10023.

to this petition as well as in the opinion written for the Court of Appeals by Judge Miller and concurred in by Judge Vinson in *Lukens* v. *Perkins*, 107 F. 2d 627, 70 App. D.C. 354. Suffice it to say that the managers of the bill made it crystal clear to the House that only local determinations were intended.

The Senate concurred in the amended House bill without further amendment and the measure became law on June 30, 1936. Senator Walsh, however, recognized that the House amendment had failed to put manufacturers from "low wage areas" at a disadvantage—as his own original Senate bill would have done. The very next year he introduced a bill[21] eliminating the "locality" restriction in Section 1(b), explaining that the "legislative intent of the present minimum wage section was to direct the administrative authorities to give effect to geographic differentials.[22]

The failure of the Court of Appeals in the instant case to accord any weight to this legislative history is plainly more erroneous than even the approach of the Court in the *Covington* case. In the determination reviewed at that time the Secretary had based his determination on two of the four standards in Section 1(b). Relying upon some evidence of occupational wage data, he found the prevailing minimum for "similar work"—one of the four standards—as well as the prevailing minimum wage for the "particular industry" to be $1.

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[21] S. 2165, 75th Cong., 1st Sess.

[22] 80 Cong. Rec. 3503, 4.

The finding based on "similar work" carried some weight with the appellate court in the *Covington* case, Judge Edgerton remarking,

> "the phrase [currently operating in the locality] is not plainly intended to qualify any other term than 'groups of industries'. *It may or may not be intended to qualify the particular or similar industries.* It can hardly be intended to qualify similar work, for work . . . currently operating in the locality would be a strange expression. The Secretary found that a dollar an hour is the prevailing minimum on similar work. He also found that it is the prevailing minimum in the particular industry. In our opinion these findings were fully warranted." (Emphasis supplied.)

Since the opinion in the *Covington* case conceded that the locality limitation "may or may not be intended to qualify 'the particular or similar' industries", it is plain that the court viewed the statute as ambiguous in this respect. We are familiar, of course, with the principle that if the wording of a statute is so clear that its meaning is unequivocal, resort to legislative history to ascertain meaning is precluded. It is an equally well established canon of statutory construction, however, that where the language is ambiguous, legislative history then becomes controlling.

2. THE QUESTION RESPECTING RESPONDENT'S MISCONSTRUCTION OF THE WORD "PREVAILING" IS ALSO OF MAJOR IMPORTANCE IN THE ADMINISTRATION OF THE ACT.

Another major issue—ignored in the opinions of the reviewing courts, which should also be settled by this court because of its importance in the administration of the Act, concerns the Secretary's interpretation of the word "prevailing". Even assuming, *arguendo*, that the *Covington* decision, relied on by the Secretary

and the courts below in this case, was correct in holding that in some industries an industrywide minimum wage is appropriate "because the competition was industrywide", it would scarcely seem that the Secretary could fix the "prevailing minimum" for that industry at a figure higher than the minimum wage of any of the competing companies.

The paradox of a "prevailing minimum," compelling every lamp company in the industry to revise its wage structure upward in order to be eligible for Government contracts is the outgrowth of a manifestly inconsistent interpretation of the statute. It is true, of course, that two multi-plant employers have higher minima at certain locations, but certainly this fact is relevant only to a determination based upon wages prevailing in local production areas. Respondent refused to make such a determination because competition among lamp companies is nationwide.

He also observed that the multi-plant companies do not utilize their individual plants to make lamps for local customers but use these plants to make either parts, on certain types of lamps which in turn are shipped to central warehouses, the stock of which is used to fill various orders. If such facts, as the respondent contends, call for a national determination, then by the same token each lamp company should be deemed a nationally integrated system and the determination should be based upon the established minimum rate in each such system.

Government contracts are not let to plants or establishments but to companies. Surely it is arbitrary and capricious to assert that a plant should be the unit for determining the minimum rate and, in the same breath, declare that the local economic factors

shaping the wage structure in these units must be ignored because the plant is a mere segment of a competing entity marketing its products on a national scale.

In the determination reviewed in the *Covington* case, the Secretary of Labor did not contend that the purpose of the Act was to raise minimum wages generally but to "prevent the flow of Government business into the hands of firms that pay substandard wages and maintain low employment standards", and that "its purpose was in short to bring about a situation where employers paying fair and reasonable wages would not lose out on Government business to low paying firms."[23]

Yet under the terms of the "prevailing minimum" in this industry all employers, no matter how "fair and reasonable" their wages, were prevented from bidding on Government contracts without some upward wage readjustment.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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[23] Notice of Proposed Amendment to the Determination for the Textile Industry, 17 F.R. 1197.